

(15. June 1724.)

Additional Information for Mr. Thomas Linnen, Minister at Lismahagow & his Spouse.

Against Anna Ker Lady Kerland and her Husband.

IN the Process by Mrs. Linnen and her Husband against Kerland and his Lady, for Payment to them of a Share of the Executory of the Deceast *Barbara Montgomery* Lady Kerland, confirmed by the said *Aana Ker* and her Husband, and intromitted with by them: The Subject of which Executory consisted in the said *Barbara's* Share of the bygone Rents of the Estate of *Kerland*, from the Year 1669, to the Year 1680, intromitted with by the Lord *Strathalland* as Donator to the Forfeiture of *Kerland*, whereof a third fell to the said *Barbara jure relictae*, and a third Share of the Rents of the same Estate, from the 1680 to the 1688, whereto she had Right by Terce. The Lord *Cullen* Ordinary having reported these two Defences, 1^{mo}, That the Relict having died before the Restitution, & the Act of Parliament restoring against the Forfeiture, providing Repetition of bygoness only to the forfeiting Person & his Representatives, no Right nor Action was competent to the Relict or her Representatives in that Subject. 2^{do}, That the Pursuers having discharged their Claim as Executors to *Kerland*, Mrs. Linnen's Father and Major *Daniel* her Brother, was thereby also excluded from this Claim. The Lords repelled the second Defence, but as to the first, The Defenders having alledged, that in the special Act Resciessory of the Forfeiture of *Kerland*, there were some Clauses which would Aid their Defence, that Point was remitted to be further heard before the Ordinary.

This Trouble might have been saved, had it not been omitted to Represent, that the special Act rescinding the Forfeiture of *Kerland* was among the Printed Acts, being the 31. 1690, and now the Ordinary is again to lay that Point before the Lords.

The Words of the Act are, That the Parliament declares all Sentences pronounced by the Justice Court in Absence for Perdwelion or any other Crime, before the Year 1669, were from the beginning Null and Void, and hereby restores all Persons or their Representatives so forfeited by the Justices *in modum Justiciae*, and particularly the Representatives of *Ker* of *Kerland*, &c. which shall be as valid and effectual to all Intents and Purposes, as if they had a special Act of Parliament reducing these Forfeitures, and allows the forsaid Persons to apply for Repetition of bygoness, to the Commission named by the Act rescinding Fines and Forfeitures for Repetition of bygoness, proceeding *Martinmas* 1688 conform to that Act.

The Defenders plead from this Statute, that the Law only provided a Restitution to the Representatives, and a Repetition to them which was directly *privilegium Personae*, and this they strain so far, that it was only intended for that Person who was Representative of the Family, so that even Younger Children, who in some Sense were Representatives, were not intended any Benefite, and much less the Widow who was no Representative.

The Pursuers on the other hand alledged, that the Forfeiture being rescinded *ex Justitia*, the Right of every Person in consequence revived, as if no such Forfeiture had been, for which there was no need of a special Provision in the Statute that being *juris communis*, and necessarily consequential to the annulling the Forfeiture, which being declared Null and Void from the beginning, behoved to be considered as if it never had existed, and so that *Kerland* had died Infeft at the Kings Peace, and that my Lord *Strathalland* had without any Title intromitted with the Rents of his Estate during his Life, and with that part of the Rents that fell to the Wife by her Terce after his Death, if which had been the Case there cou'd be no Question, but that his Relict wou'd have drawn a Share of the bygone Rents due before his Death, and wou'd have had a direct Action against *Strathalland* for the Rents falling under her Terce.

It is vain for the Defenders to insist upon the Word Representative, no other cou'd have been restored, but the forfeiting Persons or their Representatives, that is those who might be their Heirs, for the Wife was not forfeited, and so cou'd not be restored, but she being damnified by that Forfeiture, when the forfeiting Person was restored, she had also the consequential Benefit from the Rule of common Reason *sublata causa tollitur effectus*, and the Equity that the Restitution against the Forfeiture should be extended as largely to afford her Relief, as the Forfeiture had been to prejudice her.

And were it otherwise, the Parliament had not given an equal Restitution against the Forfeiture, but wou'd most unjustly transferr'd what belonged to others, to the Representative of the forfeiting Person, which was only to change the Donator, but to continue the effect of the Forfeiture upon those who had without any Fault suffered by it, which certainly never cou'd be the design of the Law, especially with respect to Wives of whom the Law had taken such Consideration, as to rescind all Transactions they had made, and to afford them recovery of Bygoness, notwithstanding of such Transactions, much less can it be supposed the Law designed to barr them from recovery of Bygoness, where no Transaction was to exclude them, and that the only Obstacle to the exercise of their Right, the Forfeiture of the Husband was removed.

If it had been otherwise, how were Widows to live after they were restored during the want of their Liferents, for they behoved for to contract Debts, whence shou'd these have been discharged.

As to the Wives dying before the Restitution, it makes no manner of Difference, every one Survives in his Representatives, whither natural or legal; and therefore that not only Children but Creditors of the Wife making up proper Titles, are *eadem Persona* with her.

In Respect whereof, &c.

J. A. BOSUELL.